

conditions that the ILECs readily absorb as a cost of doing business,²⁸ it appears to spend more time considering modification, waiver, and elimination of those same conditions.²⁹ Simply put, the Bells do not much worry about Commission enforcement, because the Commission has not given them a reason to worry about it. CLECs, who can afford to pursue only a fraction of their grievances, are beginning to question whether devoting those resources to FCC is worth it. Moreover, the Commission is not without the power to level ILEC-imposed barriers to competition in the absence of a CLEC complaint.³⁰ At bottom, the Bells are likely to continue their campaign to make use of UNEs as difficult and risky as ever for as long as the threat of Commission enforcement remains slight.

11. Reasonably Substitutable Alternatives to ILEC UNEs Have Yet to Develop

CLEC Coalition members currently buy clean copper and conditioned loops, basic loops and high capacity loops, dark fiber loops, high capacity and dark fiber dedicated transport (including entrance facilities), EELs, signaling, call-related databases, and OSS as UNEs from the ILECs. The only reason why the CLEC Coalition members are such good customers of their

²⁸ Chairman Powell has acknowledged that Bells view fines as an unimportant mechanism. Remarks of Chairman Michael K. Powell, Competitive Telecommunications Association's Annual Convention and Trade Exposition, at *3 (Mar. 4, 2002) ("But we've heard, too, this concern: 'Fines are great. But to a large incumbent, they're just the cost of doing business.' I couldn't agree more.") ("*Powell CompTel Address*").

²⁹ See, e.g., Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, to James W. Callaway, Group President - SBC Services (rel. Aug. 14, 2000) (responding to the written request of SBC, dated August 4, 2000, for an extension of the deadline for filing of performance data required under Condition 24 of the merger conditions); Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, to Michelle Thomas, Executive Director - Federal Regulatory, SBC Telecommunications, Inc. (rel. Nov. 13, 2001) (responding to the written request of SBC for a one-month extension to file results on an independent audit of SBC's compliance with Condition 24).

³⁰ The Commission retains the authority to identify and analyze complaint information, conduct investigations, conduct external audits and collect information, in connection with complaints, on its own initiative or upon request of another bureau or office. 47 C.F.R. § 0.111 (a)(13). Moreover, the Commission may redress violations the Act, and of its Rules, through fines, license suspension, cease and desist notices, and negotiated consent decrees. 47 C.F.R. §§ 1.80, 1.85, 1.91, 1.93.

main competitors is that economically and operationally viable alternatives to ILEC UNEs have not developed or have not yet developed fully. To be sure, alternative transport and signaling providers continue to make their service offerings more robust. One member of the Coalition, MFN, seeks to be primarily a carrier's carrier for transport needs, including intra-city transport. MFN, however, has had neither the time nor the funding to build out ubiquitous and fully substitutable alternatives – even in the densest markets. Moreover, MFN's resources have been stretched thin as it has fought tooth and nail with the Bells for collocation, co-carrier cross connects and access to dark fiber UNEs necessary to extend and fill-out the reach of its network.

12. All UNEs Should Be Retained, Use Restrictions Should Be Eliminated, and Access to EELs Should Be Assured

CLEC Coalition members support the retention of all UNEs and the immediate removal of all UNE use restrictions. Loops and transport – in all capacities and types – remain the most essential of the UNEs needed by these facilities-based competitors. In the face of a devastating capital crunch, access to EELs – now more than ever – is truly necessary. CLECs have little money to build and equip additional collocations and to do so in advance of securing an adequate customer base would be uneconomic (not to mention intolerable to Wall Street). As a result, EELs are needed to connect end users to CLEC networks that do not – and should not – replicate the constellation of end offices built by the ILECs over the past hundred years.

II. THE EXISTING FRAMEWORK FOR UNBUNDLING IS GENERALLY SOUND AND SHOULD BE RETAINED

The framework already established by the Commission for its Section 251 unbundling analysis is sound as a matter of both law and policy, and provides a crucial element of regulatory stability that should not be sacrificed. Honed after years of implementation, Supreme Court review, and several notice and comment proceedings, the Commission's current unbundling

framework constitutes a cogent implementation of the unbundling standard and requirements contained in Section 251 of the Act. As Congress intended, the Commission's two-tiered analysis, distinguishes between proprietary and non-proprietary network elements. Factors considered under the "impair" test for non-proprietary network elements reflect an eminently rational interpretation of the statute. Indeed, the five factors adopted by the Commission in its *UNE Remand Order* continue to supply the proper foundation for assessing whether CLECs would be impaired without access to a particular network element.

Neither the general goal of broadband deployment nor the specific mandate of Section 706 can serve to diminish UNE designation or otherwise alter the unbundling standard contained in Section 251 or the Commission's rules implementing that standard. The "at a minimum" proviso in Section 251 (d)(2) does not suggest that the "impair" standard may be supplanted by other concerns. Moreover, the proposed encouragement of ILEC broadband deployment by insulating them from unbundling requirements is not rationally related to the unbundling requirements of Section 251 and may not be used to undermine them.

Nevertheless, the Commission repeatedly has found that broadband services and the advanced telecommunications capability that makes them possible are being deployed at a satisfactory rate.³¹ CLECs and ILECs continue to expand the reach of broadband services and the network infrastructure that makes them possible. With both integrated T-1 products and DSL, members of this Coalition have led the way in bringing broadband to residential and small business customers in second-and third-tier markets. ILEC deployment has come largely in response to competition from wireline CLECs and to some extent in anticipation of competition from the cable companies. ILEC promises – vague or even implicit – to forestall or accelerate

deployment should not factor heavily into the Commission's analysis, as experience has shown that even firm promises from the ILECs are generally not worth much. As Congress predicted, ILECs will respond to competition. As history has shown, ILECs will not deploy next generation services without competition (or a heavy regulatory hand to take its place).

A. The Commission's Current "Necessary" and "Impair" Tests Properly Reflect the Will of Congress as Expressed in the Statute

The *UNE Remand* unbundling standard properly captures and implements Congress' intent to foster facilities-based competition among wireline providers. It should not be diminished or compromised under the guise of promoting broadband deployment. Moreover, it should not be altered based on a determination that the promise of intermodal competition among platform monopolists is somehow sufficient. The potential of cable, wireless and satellite services to compete with the wireline ILEC monopolies has been known for quite some time.³² Yet, Congress expressly required that ILECs provide CLECs with unbundled access to their wireline networks. Clearly, Congress contemplated that there would be robust wireline competition and it determined that unbundling was one of three ways of making that happen.³³

³¹ See *supra* note 12.

³² So-called "intermodal competition" is not sufficiently developed to erode the ILECs' stronghold over the wireline information services market. For example, recent GAO study shows that cable modems and xDSL services compete in but a small portion of the high-speed Internet access market – only 25.4% of end users have a choice between cable modems and DSL. United States General Accounting Office, *Characteristics and Choices of Internet Users*, GAO-01-345 at 18 (Feb. 2001). In fact, the Commission has recognized that cable modems are not yet a fully redundant service due to the characteristics of the cable network as a primarily residential architecture geared for one-way video streams. *Advanced Services Third Report and Order*, Appendix B at 8, ¶ 23. The Commission reached a similar conclusion for last-mile wireless broadband services. *Id.* at 11-12, ¶ 33-34.

³³ In 1996, the Commission unequivocally found that "Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy." *Local Competition First Report and Order*, 11 FCC Rcd. at 15509, ¶ 12. This finding comports exactly with Congress's own express intent: "This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., Joint Explanatory Statement at 148 ("Joint Explanatory Statement"). See also *UNE Remand Order*, 15 FCC Rcd. at 3700, ¶ 5 ("We recognize that there will be a continuing need for

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To date, the Commission generally has remained faithful to Congress' mandate. The Commission's two-tiered unbundling framework³⁴ comports with Congress's plain language and clear intent to differentiate between those elements containing protected ILEC intellectual property and those that do not. Section 251 provides that "access to such network elements as are proprietary in nature" must be necessary, while access to other "network elements" is required where a requesting carrier's ability to offer the services it seeks to offer would be impaired without unbundled access to that element.³⁵ Accordingly, the Commission has applied this two-tiered construct when evaluating whether a particular element must be unbundled.³⁶

In the *UNE Remand Order*, the Commission determined that a proprietary element is "necessary" where "lack of access to that element would, as a practical, economic, and operational matter, preclude a requesting carrier from providing the services it seeks to offer."³⁷ In order to meet this standard, a CLEC must show that "no practical, economic, and operational alternative is available, either by self-provisioning or other sources."³⁸ The Commission applied this stringent test in only one instance and that was with respect to AIN software.³⁹ Upon review of the record before it then, the Commission determined that unbundled access to AIN software was not "necessary" and it was not included on the Commission's minimum national UNE list.

all three of the arrangements Congress set forth in section 251 to remain available to competitors so that they can serve different types of customers in different geographic areas."); 15 FCC Rcd. at 3700, ¶ 6 (noting that "Congress did not express explicitly a preference for one particular competitive arrangement").

³⁴ *UNE Remand Order*, 15 FCC Rcd. at 3711, ¶ 20; *Local Competition First Report and Order*, 11 FCC Rcd. at 14641-43, ¶¶ 283-285.

³⁵ 47 U.S.C. §§ 251(d)(2)(A) & (B).

³⁶ *Compare UNE Remand Order*, 15 FCC Rcd. at 3714, ¶ 28 (finding that subloops are not proprietary, thus applying the "impair" standard) *with id.* at 3881-82, ¶ 418 (finding Advanced Intelligent Network (AIN) software proprietary in some instances and applying the "necessary" standard).

³⁷ *UNE Remand Order*, 15 FCC Rcd. at 3721, ¶ 44.

³⁸ *Id.* at 3721-22, ¶ 44.

³⁹ *Id.* at 3881-82, ¶ 418.

Thus, all existing UNEs are non-proprietary, and as such, ILECs must continue to make them available as UNEs where those elements satisfy the “impair” standard. The Commission reasonably has determined that this standard is met when “the failure to provide access to a network element would ‘impair’ the ability of a requesting carrier to provide the services it seeks to offer.”⁴⁰ In response to the Supreme Court’s requirement on remand that the Commission “apply some limiting standard, rationally related to the goals of the Act,”⁴¹ the Commission concluded that the impair standard “include[s] a ‘materiality’ component.”⁴² Thus, the Commission reasonably determined that an element must be provided on an unbundled basis if “lack of access to the element materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.”⁴³ There is no compelling reason why the Commission should now revamp its interpretation of Congress’ language.

Notably, in its *UNE Remand Order*, the Commission affirmed its prior determination that the “impair” standard was both different and less stringent than the “necessary” standard applied to proprietary network elements.⁴⁴ Thus, the Commission rationally determined that Congress intended for CLECs to have access to non-proprietary network elements, even if such access was not deemed “necessary”. The Commission also made clear in the *UNE Remand Order* that the “impair” standard does not, and is not intended to, reflect the judicial antitrust standard for “essential facilities”.⁴⁵ Thus, the elements of an essential facilities claim need not be demonstrated in order to satisfy the “impair” standard in Section 251, and the Commission

⁴⁰ *Id.* at 3725, ¶ 51.

⁴¹ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

⁴² *UNE Remand Order*, 15 FCC Rcd. at 3725, ¶ 52.

⁴³ *Id.* at 3725, ¶ 51.

⁴⁴ *Id.* at 3715-16, ¶ 31.

rationaly determined that Congress intended for CLECs to have access to non-proprietary network elements, even if such elements were not deemed “essential”. While the NPRM does not appear to challenge these holdings, Coalition members believe that it is especially important that they not be forgotten.

1. The Five Factor Impairment Analysis Adopted by the Commission in its UNE Remand Order Should Be Retained

The Commission should continue to apply the five “impairment” factors adopted in the *UNE Remand Order* during this review of unbundling obligations.⁴⁶ Born of a “totality of the circumstances” approach, application of the five impairment factors reasonably determines whether a carrier “can realistically be expected to actually provide service” without access to a particular element.⁴⁷ These factors, discussed in turn below, provide an objective measure of a requesting carrier’s need of a network element that focus appropriately on the means available to the requesting carrier, as Congress’ plain language in Section 251 requires. Applied to today’s actual market as a whole, these factors demonstrate that, with respect to every UNE, the availability of alternatives to ILEC UNEs remains insufficient to erase the impairment that would exist in the absence of ILEC unbundling requirements.

2. Costs of using non-UNE alternatives

In its 1999 *UNE Remand Order*, the Commission determined that a carrier is impaired without access to UNEs where the cost of alternative means “is materially greater than the cost

⁴⁵ *Id.* at 3728, ¶ 58.

⁴⁶ *NPRM*, ¶ 8 (citing *UNE Remand Order*, 15 FCC Rcd. at 3734-44, ¶¶ 72-99).

⁴⁷ *UNE Remand Order*, 15 FCC Rcd. at 3730 ¶ 62 (the five factors are the costs of using non-ILEC facilities, the delay in obtaining non-ILEC facilities, whether material service degradation will occur over non-ILEC facilities, the competitor’s ability to achieve ubiquity without ILEC facilities, and the operational impact of reliance on non-ILEC facilities).

of obtaining the corresponding element from the incumbent.”⁴⁸ Properly recognizing that investment in redundant facilities entails large “sunk costs”, the Commission reasoned that CLECs are significantly disadvantaged in attempting to recover those costs while offering competitive rates.⁴⁹ This result is compounded by the tremendous economies of scale that incumbents “enjoy . . . as a result of their historic, government-sanctioned monopolies.”⁵⁰ These economies of scale are unlikely to be overcome by new entrants that, as the Commission recognized, “ha[ve] few customers from which [they] can recover their costs.”⁵¹ In fact, Congress expressly intended that competitors not be disadvantaged by, but rather should share in, the incumbents’ economies of scale.⁵² Nothing has happened in the past two years that would serve to alter or undermine these conclusions.

Indeed, the Commission is aware of the enormous capital expenditures that the CLEC industry already has devoted to deployment of competitive services – voice and broadband included. CLEC capital expenditures totaled \$5 billion in 1997, increased to \$9.2 billion in 1998, and almost doubled to \$15.1 billion in 1999.⁵³ In the aggregate, CLECs have spent \$55.9 billion for local facilities in the period 1997 to 2000.⁵⁴ As a result of these enormous

⁴⁸ *UNE Remand Order*, 15 FCC Rcd. at 3734, ¶ 73. *See also Local Competition First Report and Order*, 11 FCC Rcd. at 14644, ¶ 285 (the FCC will consider whether obtaining an element from a third-party will “increase the financial or administrative cost of the service a requesting carrier seeks to offer[.]”).

⁴⁹ *UNE Remand Order*, 15 FCC Rcd. at 3735, ¶ 75.

⁵⁰ *Id.* at 3739, ¶ 86.

⁵¹ *Id.* at 3737, ¶ 80.

⁵² *See Local Competition First Report and Order*, 11 FCC Rcd. at 14508-09, ¶¶ 10-11.

⁵³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290, ¶ 192 (rel. Aug. 21, 2000) (“*Second Advanced Services Report*”).

⁵⁴ *Second Advanced Services Report*, ¶ 192. In response to this competitive investment, the BOCs invested \$100 billion during this same period, demonstrating that is the presence of competition, and not monopolies, that encourages investment. Federal Communications Commission, *Telecommunications @ the Millennium*, Figure 10 (Feb. 8, 2000).

investments, CLECs already have claimed 7 percent market share in broadband services⁵⁵ and nearly 9 percent of switched local access lines.⁵⁶ Nevertheless, these market share figures are not directly attributable to services provided over self-provisioned facilities.⁵⁷ Moreover, these investment figures demonstrate merely the tip of the iceberg with respect to the total expenditures that will be necessary for CLECs to compete using fully redundant and substitutable non-ILEC facilities.

During the past two years, the road to becoming a facilities-based carrier (or a third-party provider of network elements) with no dependence on ILEC network elements also has become more difficult and the cost of doing so has escalated dramatically. In the face of the current capital crunch, CLECs have slashed or altogether eliminated capital expenditure budgets in an effort to conserve cash.⁵⁸ To the extent that CLECs have any access to capital beyond that which is necessary to keep the doors open, most CLECs' cost of capital is dramatically higher than that of the Bells, as Wall Street recognizes the significant risks associated with competing against the entrenched Bell monopolies.⁵⁹ In addition, vendor financing – once a driver of competitive network deployment – has all but dried up.⁶⁰

⁵⁵ *Third Advanced Services Report*, ¶ 51.

⁵⁶ *2001 Local Competition Report* at 1.

⁵⁷ For example, each of the Coalition members supplements its own facilities with leased elements from the ILECs. Some coalition members also have managed to obtain certain network inputs from third-party providers.

⁵⁸ *Duke Aff.*, ¶ 4 (KMC) (proprietary version). See *Jackson Aff.*, ¶ 8 (TDS) (“The result of the careful planning process described above has been very targeted investment and overbuilding of the ILEC network only in cases where it was economically rational to do so.”).

⁵⁹ “In recent weeks, analysts have expressed concern that many providers would have difficulty recouping large capital investments in their networks.” These same analysts note that “the markets took a dive and capital dried up.” *Small Phone Companies Losing Ground to Telecom Giants*, CNet News (Oct. 5, 2000) (available at www.news.com.com/2009-1033-246610.html). Other analysts have noted that “[r]elaxing the pro-competitive interconnection requirements on the Bells in the current environment would harm the prospects for competition up and down the communication services value chain, and, thus, would

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To the extent third-party -provided facilities are even available, obtaining them at an economic rate also can prove difficult. CLEC Coalition members have found that third-party providers sometimes are unable to offer their services at prices that are sufficiently attractive to make substitution for ILEC UNEs desirable. Perhaps the biggest cost-obstacle with respect to using third-party provided network elements is the cost of connecting to them. While MFN, through its innovative collocation methods and the use of co-carrier cross connects, has attempted to address this “distribution” problem (and has succeeded only where ILECs have been cooperative), other third-party network element providers have not yet been able to address this distribution problem sufficiently. In certain instances, the additional costs of establishing transport links to a third-party provider can skew the cost equation dramatically. This problem would be exacerbated, if the Commission capitulates to ILEC demands to delist high capacity transport UNEs.

In assessing the cost factor, the Commission also must consider disparities in bargaining power. Because of their enormous size advantage, ILECs buy their network inputs more cheaply, as they are able to command volume discounts.⁶¹ ILECs also may be insulated from certain franchise and rights-of-way fees that are imposed on CLECs.⁶² The Commission also must consider that rates paid for network inputs by CLECs also will differ depending on, among other things, the ability of individual CLECs to command certain discounts. Thus, while it is

discourage investment in broadband infrastructure.” Robert E. Hall and William H. Lehr, *Promoting Broadband Investing and Avoiding Monopoly* at 2 (Feb. 21, 2002).

⁶⁰ See Margo McCall, *Vendors Scale Back Financing*, Wireless Week, Jan. 7, 2002, at 1; see also *Nortel Debt Downgraded; \$250 M U.S. Wireless Contract Fails to Stop Stock Slide*, The Hamilton Spectator, Mar. 13, 2002, at D08; Scott Moritz, *At Nortel, Strung Out on Wireless*, TheStreet.com, Feb. 28, 2002; *Optical System Vendors Try to Weather the Stormy Downturn*, Fiber Optics News, Feb. 18, 2002.

⁶¹ As noted above, most ILECs’ cost of capital also is significantly lower than that of most CLECs.

⁶² *Polito Aff.*, ¶ 6 (SNiP LiNK).

administratively practical to first judge impairment for CLECs as a group, as local competition develops, a more granular analysis may be required in this regard.

In sum, cost must remain a critical factor in the impairment analysis. Neither changed market circumstances nor changed regulatory priorities suggest otherwise. Indeed, the current capital crunch underscores the importance of this factor in assessing impairment. The ILECs continue to hold a substantial cost advantage that is attributable to their enormous size and head start. Until that advantage is neutralized, cost must continue to be a weighty factor in the impairment analysis, and the statute will continue to require the ILECs to share their advantage via cost-based unbundling.

3. Timeliness of using non-UNE alternatives

The Commission must continue to consider the timeliness with which carriers can obtain network elements outside the incumbents' network, whether through self-provisioning or from third-party sources.⁶³ The Commission has recognized that time-to-market is a crucial concern, especially with respect to the "fast-paced, high-growth market" for advanced services.⁶⁴ Customers simply will not tolerate delay and they are not sympathetic to CLEC promises of service a future date uncertain. Thus, "any delay that a competitive LEC experiences" will impair its ability to provide advanced as well as other services.⁶⁵

As the Commission has determined before, "Congress made unbundled elements available to competitive LECs to avoid the time it would take competitive LECs to duplicate the incumbents' networks, thereby promoting the rapid development of competition for all

⁶³ *UNE Remand Order*, 15 FCC Rcd. at 3740-41 ¶ 89. See also *Local Competition First Report and Order*, 11 FCC Rcd. at 14644, ¶ 287 (Congress recognized that attempting to obtain facilities from non-ILEC sources "could delay entry").

⁶⁴ *UNE Remand Order*, 15 FCC Rcd. at 3741-42, ¶ 91.

consumers.”⁶⁶ Underscoring the importance of this factor, the Commission also has found that the ability of an ILEC “to take advantage of delays” by “locking-up” customers prior to a CLEC’s becoming operational can place the competitor at a severe competitive disadvantage.⁶⁷ Ameritech-Illinois’ ValueLink volume discount tariffs serve as a good example of this practice. Fortunately, the Illinois Commerce Commission partly invalidated the ValueLink offerings on the grounds that they included unjust and unreasonable termination penalties for business customers that sought early service termination.⁶⁸ Accordingly, the Commission previously has found that delays associated with self-provisioning and with obtaining network elements from non-ILEC sources bear strongly on the impairment analysis. Nothing has happened in the past two years that would serve to alter or undermine these conclusions.

Indeed, buildout delays continue to hamper the deployment of CLEC networks and the development of non-ILEC UNE alternatives.⁶⁹ These delays typically are associated with obtaining franchises from municipalities, rights-of-way disputes,⁷⁰ and obstacles to obtaining building access.⁷¹ Such delays continue to impact negatively CLECs’ ability to self-provision or to obtain non-ILEC alternatives from third-party providers that frequently experience the same

⁶⁵ *Id.*, 15 FCC Rcd. at 3741-42, ¶ 91.

⁶⁶ *Id.*, 15 FCC Rcd. at 3742, ¶ 92.

⁶⁷ *Id.* at 3741-42, ¶ 91.

⁶⁸ *Association of Communication Enterprises f/k/a Telecommunications Resellers Association v. Ameritech Illinois*, Case 00-0024, Order (Jan. 3, 2002), *aff’d*, Order on Rehearing (Feb. 20, 2002).

⁶⁹ For example, in Verizon territory, CLECs face tremendous delay in both receiving rights-of-way approval and in constructing facilities along rights-of-way. *Polito Aff.*, ¶¶ 6-7 (SNIPLINK). Verizon, by contrast, faces almost no delay, especially in New Jersey where there are no rules requiring Verizon to obtain approval prior to constructing facilities along a right-of-way. *Id.*, ¶ 4.

⁷⁰ “[O]verbuilding the incumbent LECs’ loops would embroil the competitor in lengthy rights-of-way disputes, and would require the unnecessary digging up of streets.” *UNE Remand Order*, 15 FCC Rcd. at 3729 ¶ 60.

⁷¹ The Commission has acknowledged that obtaining access to multiple tenant environments, including apartment buildings and office buildings, “poses special challenges to facilities-based entry.” *Promotion of*
... Continued

delays. Two years' passing has not leveled the ILECs' advantage in this regard. ILECs have all the franchises they need (if, in fact, they need any), have extensive rights-of-way developed over the past hundred years and they are in virtually every building. Thus, it remains unreasonable to expect that competitors can build a fully redundant network, or can rely substantially on their fellow CLECs and other would-be third-party providers that face the same obstacles, without substantial delay.

Notably, delay also occurs when CLECs must wait to obtain the capital necessary to fund network builds. As explained above, the capital markets have essentially dried-up for the competitive industry, making the task of raising cash to finance network builds increasingly difficult.⁷² That difficulty involved in attracting scarce capital leads to further build-out delay for CLECs seeking to self-provision and for those seeking to build in order to provide wholesale alternatives to ILEC UNEs.

For these reasons, the delays that a carrier would experience if forced to obtain network elements outside the incumbent's network must remain a critical factor in the impairment analysis. Neither changed market circumstances⁷³ nor changed regulatory priorities point to a different conclusion. The ILECs' head start continues to provide time-to-market and time-to-service advantages that CLECs cannot ameliorate absent the use of UNEs. Until that advantage is neutralized, delay must continue to be a weighty factor in the impairment analysis, and the statute will continue to require the ILECs to share their advantage via cost-based unbundling.

Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, First Report and Order, FCC 00-366, 15 FCC Rcd. 22983, 22990 ¶ 11 (2000) ("*Competitive Networks Order*").

⁷² See *supra* note 50.

⁷³ For example, KMC "still has not found any third party that can provide it with alternatives to ILEC loops to fit its proposed service plan." Duke Aff., ¶ 11 (KMC). In addition, NuVox remains unable to obtain DS1

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4. Quality of non-UNE alternatives

Among the chief goals of Congress⁷⁴ and of the Commission⁷⁵ under the 1996 Act is to ensure that customers receive quality telecommunications services. In order to ensure quality of service, the Commission must continue to ensure that competitive carriers have access to quality network element inputs. If a carrier could obtain only substandard facilities from third-party sources (or was forced to rely prematurely on self-provisioning or intermodal platforms⁷⁶), customers could be left with substandard service. Customers will not embrace competition, if it means running the risk of suffering a discernible degradation in service. The Commission, therefore, has appropriately considered service degradation as a critical factor in its impairment analysis and has found that a network element must be available on an unbundled basis where the CLEC would experience “a material degradation in service quality” by using a non-ILEC alternative.⁷⁷ Again, nothing has transpired during the past two years that would call into question the reasonableness and the relevance of these conclusions.

5. Ubiquity of non-UNE alternatives

Network elements must be ubiquitously available in order for CLECs to be able to win customers and gain market share.⁷⁸ As the Commission has stated, the inability to provide

level dedicated transport from alternative vendors, and has had only minimal success in finding DS3 alternatives. Jackson Aff., ¶¶ 8, 11 (NuVox).

⁷⁴ The 1996 Act was adopted “to promote competition and reduce regulation in order to secure lower prices and higher quality services for Americans.” H.R. Rep. No. 104-204, 104th Cong. 2d Sess. at 1 (“House Report”).

⁷⁵ *UNE Remand Order*, 15 FCC Rcd. at 3727, ¶ 55.

⁷⁶ The Commission has unequivocally held that wireless local connectivity is not so developed as to constitute an adequate substitute for wireline unbundled loops. *UNE Remand Order*, 15 FCC Rcd. at 3782, ¶ 188 (“We disagree with parties that argue that mobile telephones and fixed wireless offer an alternative to the incumbent’s loop, and that loops therefore should not be unbundled. Although we find these technologies promising, we conclude that they are not yet viable alternatives to the incumbent’s wireline loop facilities.”).

⁷⁷ *UNE Remand Order*, 15 FCC Rcd. at 3743, ¶ 96.

⁷⁸ *Id.* at 3744, ¶ 98.

service ubiquitously in a given market “could significantly thwart the competitor’s ability to respond to consumer demand”.⁷⁹ The Commission correctly recognized that this is especially true with respect to CLECs seeking to serve residential and small business customers.⁸⁰ The Commission also recognized that “it would be impractical, if not impossible,” for CLECs to replicate the ILECs’ networks and that ILECs enjoy advantages of a ubiquitous network that provides them with economies of scale and the ability to reach all customers in their service territories.”⁸¹ Thus, the Commission determined that CLECs would be impaired if lack of access to a UNE materially restricts the number or geographic scope of the customers they can serve.”⁸² Nothing has happened in the past two years that would serve to alter or undermine these conclusions.

Indeed, as CLEC Coalition members demonstrate in the affidavits attached hereto, none of them have yet been able to replicate the ILEC network of transmission elements in any given market through self-provisioning.⁸³ Moreover, no third-party vendors have replicated the ubiquity of the ILEC networks – even in the densest parts of the largest metropolitan markets.⁸⁴ As NuVox has found, “within any particular market, third-party providers collectively do not provide anything approaching the ubiquitous geographic coverage of dedicated transport that NuVox requires.”⁸⁵ Given today’s market reality, reliance on non-ILEC UNE alternatives would

⁷⁹ *Id.* at 3744, ¶ 98.

⁸⁰ *Id.* This also is true with respect to larger business customers, especially those with multiple locations.

⁸¹ *UNE Remand Order*, 15 FCC Rcd. at 3744, ¶¶ 97-98.

⁸² *Id.* at 3744, ¶ 97.

⁸³ Duke Aff., ¶ 11 (KMC) (“Without access to unbundled high-capacity loops KMC would be forced to forego service” to a large number of customers.) (see attached) (exact data available in proprietary version of Duke Affidavit).

⁸⁴ Cadieux Aff., ¶ 10-11 (NuVox); Polito Aff., ¶ 8 (SNiP LiNK) (“We have not been able to obtain the ubiquitous network build-out that we require in our markets without ILEC transport.”).

⁸⁵ Cadieux Aff., ¶ 11 (NuVox).

result in a limited and patchy network at best. Such limitations effectively would guarantee that competitors would be relegated to various geographic and market niches. Such relegation would be contrary to Congress' express goal of delivering the benefits of competition as broadly as possible.⁸⁶ Thus, competitors today continue to rely on ILEC UNEs to attain a ubiquitous and robust network through which they may attempt to replicate the ubiquitous market presence (and attendant economies of scale) that the ILECs enjoy.⁸⁷

For these reasons, ubiquity must remain a critical factor in the impairment analysis. Neither changed market circumstances nor changed regulatory priorities point to a different conclusion. The ILECs' head start continues to provide the advantage of a ubiquitous market presence (and attendant economies of scale) that CLECs cannot replicate absent the use of UNEs. Until that advantage is neutralized, ubiquity must continue to be a weighty factor in the impairment analysis.

6. Operational impact of using non-UNE alternatives

The Commission must continue to consider the overall impact on carrier operations that would result from the use of non-ILEC UNE alternatives. As the Commission previously has held, where a CLEC is forced to rely substantially on self-provisioning or third-party vendors for network deployment, it could experience technical difficulties associated with connecting elements from multiple vendors to others it self supplies, thus materially diminishing the CLEC's

⁸⁶ The purpose of the 1996 Act was broadly stated "to secure lower prices and higher quality services for Americans telecommunications consumers." House Report at 1. The Commission has also stated that it "seek[s] to encourage the rapid introduction of competition in all markets, including residential and business markets." *UNE Remand Order*, 15 FCC Rcd. at 3702, ¶ 9. In addition, the Commission has recognized that "Congress ... clearly intended for competition to develop in these [residential] markets, as well as in the business markets, and we see as one of the primary goals of section 251, to facilitate competition in these markets." *Id.* at 3745, ¶ 100. Indeed, in 1996 the FCC held that the 1996 Act "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing providers to enter all markets." *Local Competition First Report and Order*, 11 FCC Rcd. at 15506, ¶ 4.

ability to reach customers and provide quality service.⁸⁸ Nothing has happened in the past two years that would serve to alter or undermine this conclusion.

It remains the case today that the greater the number of meet-points, the greater the potential for operational glitches. Moreover, cobbling together elements from multiple vendors poses considerable logistical and organizational challenges, that must be addressed. Back office systems and procedures must be developed for incorporating non-ILEC UNE alternatives into CLEC networks. Notably, these are in addition to those that CLECs already must develop to interconnect with the ILEC and use ILEC UNEs. This added layer of complexity and expense can result in delay in or degradation of service which would impair a CLEC's ability to serve customers and compete effectively.

For these reasons, impact on network operation must remain a critical factor in the impairment analysis. Neither changed market circumstances nor changed regulatory priorities point to a different conclusion.

7. The "At a Minimum" Language Does Not Suggest that Other Considerations May Displace the "Impair" Standard

It is beyond question that the "at a minimum" proviso in Section 251 authorizes the Commission to consider additional factors in its unbundling analysis.⁸⁹ In its *UNE Remand Order*, the Commission identified five "other factors" that it considered relevant to its unbundling analysis. These five factors included (1) the rapid introduction of competition to all markets, (2) the promotion of facilities-based competition, investment and innovation, (3) reduced regulation, (4) certainty in the market, and (5) administrative practicality. Each of these

⁸⁷ *UNE Remand Order*, 15 FCC Rcd. at 3738, ¶ 84.

⁸⁸ *UNE Remand Order*, 15 FCC Rcd. at 3744-45, ¶ 99.

⁸⁹ *See id.*, 14 FCC Rcd at 3745-46, ¶¶ 101-02.

five additional factors – including the promotion of facilities-based competition, investment and innovation – remains relevant today. None, however, can serve to displace the core impairment analysis required by the statute. Moreover, none should be assigned a specific weight, although the third – deregulation – is certainly a statutory goal dependant on the success of another, namely, the successful replacement of monopolies with competition.⁹⁰

Recently, the Commission appears to have elevated the goal of deployment of advanced telecommunications capability – commonly referred to in shorthand as “broadband” – above that of promoting the development of local competition.⁹¹ The basis for this re-prioritization appears to be political rather than statutory. Nevertheless, it is improper to view these goals as competing. As the Commission has found previously, Section 706 was not designed to upend or ameliorate the market-opening unbundling provisions of Section 251.⁹² Further, it is evident that Congress intended for *competition* to spur the deployment of advanced telecommunications capability and that the Commission and its state counterparts must do what they can to facilitate *that* process.⁹³

⁹⁰ The *NPRM* appears to express a desire to deregulate ILECs before the intended benefits of the targeted regulations – fully functioning competitive local markets – have come to fruition. See *NPRM*, ¶ 24 (stating that the Commission is considering “exempting” new ILEC facilities from unbundling “so as to encourage incumbents and others to invest in new construction” without acknowledging that the 1996 Act makes no distinction between “old” and “new” facilities for unbundling purposes).

⁹¹ See e.g., *Third Report on Advanced Services*, Statement of Chairman Michael J. Powell at 1 (“the Commission’s central policymaking focus is and should remain the promotion of efficient broadband deployment”).

⁹² *UNE Remand Order*, 15 FCC Rcd. at 3783, ¶ 190 (“we note our obligation under section 706 to encourage the deployment of advanced services by, among other means, promoting competition in the telecommunications market”); see also *Advanced Services MO&O*, 14 FCC Rcd. at 24047-48, ¶ 77 (“Rather, the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services. Under section 10(d), we may not use that authority to forbear from applying the requirements of section 251(c) and 271 prior to their full implementation.”).

⁹³ See Joint Explanatory Statement at 1 (the 1996 Act is “designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all
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Although the “at a minimum” language does permit the Commission to incorporate other rationally related policy considerations in its unbundling analysis, CLEC Coalition members are hesitant to support inclusion of the Act’s goal of encouraging the deployment of advanced telecommunications capability as an additional consideration in the Commission’s unbundling analysis.⁹⁴ The reason for this hesitancy is that the deck appears to be stacked. Almost all of the questions the Commission asks in this regard consider limiting or eliminating ILEC unbundling obligations in various ways that the Commission previously and correctly has rejected.⁹⁵ Indeed, underlying each proposal to “deregulate” by eliminating certain unbundling requirements cited by the Commission is the unfounded assumption that unbundling discourages the deployment of advanced telecommunications capability and the judgment that theoretical deployment by the Bells is preferable to the competition-spurred deployment envisioned by Congress.⁹⁶ As explained in the next section, unbundling and the competition that results encourages investment in and the deployment of advanced telecommunications capability by both ILECs and CLECs.

Moreover, the Commission simply does not have the authority to accept the ILECs’ implied promises to deploy and innovate in exchange for relief from the unbundling obligations that Congress designed to get ILECs to do precisely that – while allowing competitors access necessary to enable them to do the same. Neither the “at a minimum” language in Section 251(d)(2) nor any other provision of the 1996 Act contemplates or permits the elimination of or

telecommunications markets to competition[.]”). See also *UNE Remand Order*, 15 FCC Rcd. at 3748 ¶ 110; *Advanced Services MO&O*, ¶ 74.

⁹⁴ See *NPRM*, ¶ 23-26.

⁹⁵ For example, the Commission asks whether fiber loops should be categorically delisted. To do so would upend the Commission’s prior findings that the Act is technologically neutral. *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 177; *Local Competition First Report and Order*, 11 FCC Rcd. at 15679-83, ¶ 356-365.

⁹⁶ The 1996 is intended to “encourage the rapid deployment of new telecommunications technologies” to all Americans. House Report at 1.

“exemption” from unbundling requirements – and the goal of wireline local competition – in exchange for implicit promises by the Bells to fulfill the goals of Section 706.⁹⁷ A finding to the contrary would fly in the face of the clear statutory scheme and would be entitled to no deference on review.⁹⁸

Indeed, using the “at a minimum” language as a springboard for deregulating the Bells and decreasing the types of UNEs uniformly available on a national basis – or otherwise exempting ILECs from unbundling obligations – would represent a significant departure from the Commission’s established course.⁹⁹ Neither the statute nor “changed circumstances” support such a departure. Indeed, market experience suggests that there is no reason to believe that ILECs will not construct to meet wholesale or retail demand, to enhance their competitive position, or to respond to competitive pressures. Regulation does not appear to be hampering the Bells’ ability to compete effectively with intramodal or intermodal providers of broadband. Indeed, to date, the Bells have been able to command a premium for their DSL service.¹⁰⁰

Thus, the answer to the Commission’s query as to whether it should modify or limit ILECs’ unbundling obligations going forward to encourage ILECs and others to invest in new

⁹⁷ Comments submitted last month by ILECs in the ILEC Broadband proceeding are but the most recent iteration of these promises. CC Docket No. 01-337, Comments of BellSouth Corp. at 23-24; Comments of Verizon at 34 (claiming that “the record shows current regulation stifles rather than stimulates investment in advanced services”); Comments of SBC at 4.

⁹⁸ *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 –72 (2001) (agencies are due deference where Congress has afforded “a gap for the agency to fill” and according to “to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position”) (citation omitted). See also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

⁹⁹ See *UNE Remand Order*, 15 FCC Rcd. at 3746, ¶ 102.

¹⁰⁰ SBC charges \$50 per month for DSL service, while cable modem service typically costs \$40 per month. *Regional Bells Ringing Up Higher DSL Rates*, Interactive Week (Feb. 18, 2001). Verizon and BellSouth raised their DSL prices to \$49.95 per month in May 2001. *Verizon Joins Broadband Price Hike Parade*, PCWorld.com (May 2, 2001); *BellSouth, Verizon to Raise DSL Rates*, Today’s News (May 7, 2001).

construction is a resounding “no”.¹⁰¹ If any encouragement is needed, it must take some other form. The same answer (“no”) applies with respect to the Commission’s sub-queries as to whether it should adopt an unbundling exemption for any facilities an incumbent LEC constructs after a certain time;¹⁰² whether it should exempt from unbundling obligations only certain types of new facilities, such as those intended to provide advanced telecommunications capabilities;¹⁰³ whether it should categorically de-list fiber loops or exempt all fiber based broadband facilities deployed by incumbents in “new build and total rehab situations”;¹⁰⁴ and whether new facilities automatically trigger relief from unbundling obligations.¹⁰⁵ Again, “changed circumstances” do not support a change in established Commission policy on these temporal and technology-based distinctions. Similarly, the “at a minimum” language of section 251(d)(2) does not support making a distinction between unbundling facilities used for analog voice telephone, and those used for advanced technology. The Commission never before has found a statutory basis for making this technology-based distinction and none has developed over the past two years.

Although each of these proposals has its own set of distinct problems,¹⁰⁶ they all fail to consider whether CLECs would be impaired without access to the network elements they

¹⁰¹ *NPRM*, ¶ 24. The Commission also asks whether it should “clarify or modify pricing rules to allow incumbent LECs to recover for any unique costs and risks associated with such investment so as to encourage investment in new facilities”. The answer to this question is that no modification is needed. Like so many other aspects of the current broadband debate, the “unique costs and risks” are undefined and unsubstantiated. Nevertheless, the statute does not provide a different cost-based pricing requirement for the network elements the ILECs seek to shield from unbundling – whether they be suitable for broadband, digital or simply shiny and new.

¹⁰² *Id.*, ¶ 24.

¹⁰³ *Id.*, ¶ 23.

¹⁰⁴ *Id.*, ¶ 24.

¹⁰⁵ *Id.*, ¶ 25.

¹⁰⁶ For example, relieving ILECs from having to unbundle fiber UNEs would lead to anticompetitive and uneconomic deployment of fiber which may not bring any benefit to end users and would certainly impair CLECs and thwart competition.

propose to shield from unbundling. The “at a minimum language” does not translate into “or consider something else unrelated to impairment.” The advantages the ILECs accrued during their government-sanctioned monopoly days did not cease with the advent of the 1996 Act.

Similarly, nothing in the Act suggests that its unbundling requirements were intended to apply only to particular network elements in the ground as of a date certain or to elements used to provide analog voice services, but not for those used to provide broadband voice and data.¹⁰⁷ The Bells each have one interconnected network – voice and broadband, analog and digital, old and new are not now separated nor were they separated in 1996 (broadband itself is not “new”). In short, it’s all connected and it has been for some time. The same network elements essential to providing broadband services often will be essential to providing voice service and vice versa. The ILECs do not have separate voice and broadband networks and the FCC should not regulate as if they did. To do so, would preserve ILEC wireline monopolies and discriminatorily limit the scope of services new entrants could seek to provide. If the Bells want to create a world where the new is protected and separated from the old, they need to convince Congress to do that. The Commission presently does not have the grant of authority to draw such lines.

8. Establishing the Proper Foundation for Competition Is the Best Way to Encourage Investment in Facilities and Broadband Deployment

Establishing the proper foundation for competition – including access to UNEs – is the best way to encourage investment in facilities, broadband deployment, and the development of innovative services. As the Commission recognized in its recent Third Report on advanced

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Indeed, the FCC has found this to be the case several times. For example, line sharing is an element exclusively devoted to advanced services. The Commission expressly recognized this fact, describing line sharing as “non-voiceband transmission frequencies,” but determined that this element was among the “features and functionalities” of a loop that Section 251(c)(3) permits to be unbundled. *Line Sharing Order*, 14 FCC Rcd. at 20923-24, ¶ 18. In addition, the Commission ordered the unbundling of “loops

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services capability, the introduction of competition to the local market has caused a dramatic increase in broadband facilities deployment since 1996.¹⁰⁸

As but one example of competitors “spurring” broadband deployment,¹⁰⁹ it is at this point beyond cavil that ILECs would not have deployed Digital Subscriber Line (“DSL”) services absent the entry of CLECs providing DSL.¹¹⁰ For example, TDS Metrocom has been the forerunner in DSL provisioning in Wisconsin and Illinois, especially for residential and small business customers. As TDS Metrocom built out its DSL facilities and began offering DSL services, SBC-Ameritech followed in its footsteps.¹¹¹ Had TDS Metrocom not chosen to provide service in Wisconsin, it is doubtful that Ameritech would have readied itself for DSL service. Notably, the competitive pressure that provided SBC-Ameritech to finally deploy DSL services in Wisconsin was UNE-based competition, as it already had ignored cable modem service offerings in a number of markets for some time. Notably, to provide DSL, TDS Metrocom purchases clean copper loops from Ameritech and aggregates such traffic onto high capacity transport UNEs also obtained from Ameritech. Thus, it was competition and unbundling that

capable of transporting high-speed digital signals” despite their being used exclusively for advanced services. *Advanced Services MO&O*, 12 FCC Rcd. at 24012, ¶ 52.

¹⁰⁸ The Commission has noted that “industry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market.” *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33 ¶ 62 (rel. Feb. 6, 2002) (“*Third Advanced Services Report*”).

¹⁰⁹ See *id.*, ¶ 62.

¹¹⁰ The President’s Council of Economic Advisors stated in the 1999 Economic Report of the President that “[a]lthough DSL technology has been available since the 1980s, only recently did local telephone companies begin to offer DSL services to businesses and consumers ... [t]he incumbents’ decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors.” (quoted in “An ALTS Analysis: Local Competition Policy and The New Economy” at 4 (Feb. 2, 2001). Of the three largest CLEC DSL providers – Covad, NorthPoint and Rhythms – only one, Covad (which recently emerged from bankruptcy) still exists.

spurred deployment of broadband in Wisconsin – and elsewhere. When it became time to compete, regulation did not stop Ameritech from deploying DSL equipment.

Critically, “broadband” is not limited to DSL. Coalition members and other CLECs across the country have introduced small and medium sized businesses across the country to innovative bundled voice and broadband service offerings provisioned over high capacity T1 loops and transport. Using Wisconsin as an example, once again, TDS Metrocom has been quite successful in luring customers to these integrated T1 service offerings by bundling voice services, long distance calling plans, data and various calling features. Although Ameritech had somewhat similar bundled service offerings available via tariff, it seldom marketed or sold them as it sought to protect its more lucrative practice of offering services on an a-la-carte basis. Only in response to TDS Metrocom’s success with these bundled service offerings did Ameritech begin to actively market and sell its competing service. NuVox has found the its integrated T1 “broadband bundle” has prompted a similar response in its home markets. Once again, CLECs led the way and ILECs responded. And, once again, this is the result of real UNE-based wireline competition (and not that of theoretically possible, but largely nonexistent, intermodal competition).

Available market data confirm these factual anecdotes, as such data indicate that ILECs and CLECs alike are investing in and deploying broadband capability. Three times the Commission has reviewed the industry’s progress toward deploying advanced service capability and three times the Commission has found such deployment to be satisfactory.¹¹² Each time the

¹¹¹ As Nicholas Jackson states in his affidavit, “the ILEC did not begin to provision DSL until after TDS Metrocom had shown success in the market[.]” Jackson Aff., ¶ 15 (TDS).

¹¹² A recent pronouncement from the Chairman of the President’s Council of Economic Advisors suggests that, to the extent there is some sort of broadband problem, that problem resides on the demand rather than

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